No. 98-536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOMMY OLMSTEAD, Commissioner of the Deparmtent of Human Resources of the State of Georgia, et al.,

Petitioners,

—v.—

L.C. and E.W., each by JONATHAN ZIMRING, as guardian ad litem and next friend,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE VOICE OF THE RETARDED, ET AL., IN LIMITED SUPPORT OF AFFIRMANCE*

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Alliance of Louisiana Schools for the Mentally Retarded

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American Federation of State, County and Municipal Employees, AFL-CIO

The Arc of Mercer County

Arkadelphia Human Development Center Parents Group (AR)

Arkansas Advocates for Human Development Center Residents

Associates in Communication Therapies, PC (TN)

Association for Hunterdon Developmental Center (NJ)

Association for the Mentally Retarded of Agnews (CA)

Association of Retarded Citizens – Santa Clara County (CA)

Austin State School Parent Association (TX)

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Beatrice State Developmental Center Parents Association (NE)

Beverly Farm Foundation (IL)

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Common Thread (AR)

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Corpus Christi State School Parents Association (TX)

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The Dever Association (MA)

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Frances Haddon Morgan Center Parent Association (WA)

Friends and Families of the Black Mountain Center (NC)

Friends of Anne Grady Center (OH)

Friends of Choate (IL)

Friends of Fircrest (WA)

Friends of the Jacksonville Developmentally Disabled (IL)

Friends of Rainier, Inc. (WA)

Friends of Retarded Citizens of Connecticut, Inc.

Friends of Tarwater (AL)

Glavin Association for the Retarded (MA)

Glenwood Citizen Advisory Board (IA)

Glenwood Parent Family Association (IA)

Good Shepherd Manor (IL)

Great Oaks Association, Inc. (MD)

Green Line Parent Group, Inc. (CA)

Greentree Applied Systems, Inc. (KY)

The Harris Group (VA)

Hilltoppers, Inc. (TN)

The Home and School Association of Southbury Training School (CT)

Howe Association for Retarded Citizens (IL)

Illinois League of Advocates for the Developmentally Disabled

Jonesboro Human Development Center Parents' Group (AR)

Kankakee Association for the Mentally Retarded (IL)

Lakeland Village Association (WA)

Lake Owasso Parent Group (MN)

Landmark Supporters (FL)

Lawrence County Association for Retarded Citizens (PA)

Lincoln Parents' Association of Lincoln Illinois Developmental Center

Link Associates (IA)

Lubbock State School Parent Association (TX)

Lufkin State School Parents Association for the Retarded of Texas (TX)

Meadows Parents Association (IL)

Melmark, Inc. (PA)

Mental Retardation Association of Missouri

Mental Retardation Association of Nebraska

Mental Retardation Association of Utah

Mexia State School Parents Association (TX)

Misericordia Family Association (IL)

Mount St. Joseph Association (IL)

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New Mexico Parents and Guardians for Persons with Developmental Disabilities

North Mississippi Regional Center

North Mississippi Regional Center Parents and Friends Organization

North Star West Crime Watch (TX)

Northern Wisconsin Center Parents Group

The Office Inc. (TX)

Ohio League for the Mentally Retarded

Oregon Voice of the Retarded

Parent and Guardian Association of the Coastal Center (SC)

Parent Association of Northwest Louisiana Developmental Center

Parent Association for the Retarded of Texas

Parent Committee of Southern Wisconsin Center for Developmentally Disabled

Parent Guardian Association of Arlington Developmental Center (TN)

Parent Hospital Association – Sonoma Developmental Center (CA)

Parent-Relative Organization for Oakwood Facilities, Inc. (KY)

Parents and Associates of Northern Virginia Training Center

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Parents and Friends of Hammond Developmental Center Association (LA)

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Parents Coordinating Council and Friends (CA)

Parents of Adult Children Concerned for Tomorrow (IL)

Parents of Woodhaven Incorporated (PA)

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Pinecrest Parent's Association (LA)

Pleasant Manor Parents Advisory Board, Inc. (PA)

Porterville Developmental Center Parents Group, Inc. (CA)

ProCare3 (NE)

Relatives and Friends Association of White Haven Center (PA)

Richmond State School Parents' Association (TX)

River Valley Accessibility Council (AR)

Rosewood Center Auxiliary, Inc. (MD)

Sacramento Association for the Retarded (CA)

Save Agnews Now (CA)

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Southwest State School Parents Association (LA)

Tallahassee Developmental Center Advocates (FL)

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Western Center Parents Group (PA)

Wisconsin Parents Coalition for the Retarded, Inc.

Woods Services, Inc. (PA)

Wisconsin State Employees Union, American Federation of State, County, & Municipal Employees, Council 24

Woodbridge Developmental Center Parents Association (NJ)

Woodward State School and Home Association (IA)

Wrentham Association for the Retarded (MA)

American Health Care Association

Families and Friends Association of Hamburg Center

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Preliminary Statement

This is an *amicus curiae* brief on the merits, submitted upon the consent of both parties pursuant to this Court's Rule 37.3(a). (App. at 1a-2a.) Prepared by Voice of the Retarded ("VOR"),[1] it is adopted by 141 organizations advocating the rights of the disabled.[2]

Interest of the VOR Amici

VOR is an advocacy organization incorporated in Illinois, dedicated to insuring that individuals with mental retardation receive the care and support they require in a setting appropriate to their needs. Depending on the unique condition of each disabled person, that appropriate setting could be community placement, as respondents argue here, or institutionalization, as petitioner Georgia urges. A spectrum of choices must be available, because not every disability lends itself to community placement.

The unique perspective VOR offers in this litigation is the applicability of the Americans With Disabilities Act, 42 USC §§ 12101 *et seq*. ("ADA"), to one placement option, institutionalization.[3] VOR agrees with the Court of Appeals that

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[1] Pursuant to this Court's Rule 37.6, VOR represents that no counsel to any party authored this brief, in whole or in part. Counsel to the VOR have acted *pro bono*. Disbursements have been paid only by VOR.

[2] Their names begin at p. i, *supra*. They do not include organizations such as ADAPT (American Disabled for Attendant Programs Today), whose confrontational tactics are rejected by VOR. (See App. to Florida Amicus Brief ["Fla. App."], at 17a-21a.) We trust that common goals advancing the interests of America's 43 million disabled (42 USC § 12101[a][1]) will appear from this brief.

[3] VOR also advances family participation in the choice of treatment options, with the decisions of the disabled person and her family recognized as primary. VOR has previously presented this position to this Court for 100 *amici* in *Heller* v. *Doe*, 509 US 312 (1993), and as supporters of petitioner in *People First of Tennessee* v. *Arlington Develop-*

institutionalization is a permissible choice under the ADA when warranted by the facts of a particular case. VOR is troubled by *dicta* in the Court of Appeals opinion which appear to threaten elimination of this placement option—a position which we submit is at odds with the ADA.[4]

Summary of Argument

The ADA has always permitted institutional placement, as long as it was the least restrictive alternative available (or the most integrated setting appropriate), upon the medical, behavioral and care needs of the disabled person involved. The safety and constant monitoring provided by an institution presents one care option envisioned by the ADA to insure maximum possible self-reliance for disabled people. Ideally, some of those people could even progress to community placement. (Point I, below.)

mental Center, No. 97-5232 (6 Cir.; May 7, 1998; unpublished); *cert. denied*, ___ US ___ (Nov. 16, 1998). It has also similarly appeared before the Supreme Judicial Court of Massachusetts in *Judge Rotenberg Educational Center, Inc.* v. *Campbell*, No. 17101-Bristol, and in the District Court in *Cramer* v. *Chiles*, No. 96-6619 CIV-FERGUSON (SD Fla. 1998). VOR's position on family participation was enacted as a statement of policy in the Developmental Disabilities and Bill of Rights Act Amendments of 1994, codified at 42 USC § 6000(c)(3).

[4] Given the conflicting *dicta*, VOR submits that a clear statement is urgently needed from this Court that institutional placement is an available option under the ADA when medical facts preclude community placement. See *Easley* v. *Snider*, 36 F. 3d 297 (3 Cir. 1994).

ARGUMENT

I. THE OPTION OF INSTITUTIONAL PLACEMENT IS PRESERVED UNDER THE ADA.

A. Introduction: The National Debate

"Disability" should not be a collective noun. There are degrees of disability, and differences in the appropriate treatment of disability. Community placement may well be an effective option for those whose disabilities are less severe. For many of the severely disabled, however, institutional placement is the best possible caregiving choice.

The essence of the problem was sensitively captured by District Judge Franklin D. Burgess in *People First of Washington, Inc.* v. *Rainier Residential Habilitation Center, et al.*, No. C96-5906 FDB (WD Wash 1997):

> "[Intervenor] explains that there is 'a great debate' in this country about how to best treat, care for, and accommodate the mentally retarded and developmentally disabled. On one side are those who say that large, institutionalized care is inhumane, unnecessarily restrictive, and violative of human rights, and that all developmentally disabled persons should be placed in small, community based programs. On the other side are those who say that a 'continuum' of care is more appropriate, that is, that while some disabled persons can function in community settings, others are so severely disabled that, for them, an institution with centralized, constant protection and care is a better alternative. [Intervenor] acknowledges that on both sides are experts, examples of failure, and families with difficult choices and hard feelings."

VOR advocates preservation of the choice of institutional placement, without eliminating the option of community

placement.[5] We further submit that each choice is available under the ADA.

B. ADA Provisions

1. Overview

Liberation from the effects of disability is the major thrust of the ADA. The ramps it requires; the physical barriers it removes; the platform lifts it installs—all serve to transform a wheelchair into a chariot. VOR warmly endorses this result.

As applied to caregiving options, the ADA insures that there will be no more Willowbrooks. Never again can the severely disabled be "shunted aside, hidden and ignored". *Alexander* v. *Choate*, 469 US 287, 296 (1985). Here, again, VOR applauds the result.

But there are disabled people who cannot use a wheelchair, or safely move into the community. Does the liberating thrust of the ADA force those people from a protecting institution? From this perspective, VOR approaches the statute.

2. Role of the Institution

The ADA mentions the institutional placement option only once, at 42 USC § 12101(a)(3). The statutory pattern is clear.

Congress begins the ADA with a description:

> "An Act to establish a clear and comprehensive *prohibition of discrimination* on the basis of disability." (104 Stat. 327, preceding enactment language; emphasis added.)

[5] Those who advocate elimination of either of these choices recently found their position harshly paraphrased:

> "[L]aw-and-order conservatives want people permanently locked up, and nurturing liberals want more community-based services and housing, but bridle at restrictions on patients' personal liberties."

(Satel, *Real Help for the Mentally Ill*; New York Times, 1/7/99, p. A 31, col. 3.) VOR endorses Judge Burgess' expression of the agonizing choices presented.

The statute then makes several "findings". It begins with the number of disabled nationwide. (42 USC § 12101[a][1].) It then recites that disabled individuals have suffered discrimination through isolation, and segregation from outside society. (42 USC § 12101[a][2].) The statute next finds that this discrimination "persists in...critical areas", specifying eleven. The eighth of these is "institutionalization". (42 USC § 12101[a][3].)

A listing of the other ten areas provides the context. They are:

> "employment, housing, public accommodations, education, transportation, communication, recreation, . . . health services, voting, and access to public services." (*Ibid.*)

Nowhere does the statute fault any of these "critical areas". The existence of a workplace, or a train, or a stadium, is not a violation *per se*; the statute attacks any discrimination occurring there. The presence of an institution is not condemned by the ADA, any more than a polling booth is.

3. Degrees of Disability

The ADA recognizes that some people are more disabled than others. This conclusion follows from the statutory term "*qualified* individual with a disability" (42 USC §§ 12111[8] and 12131[2]; emphasis added), and also from the public accommodation title of the ADA, requiring:

> "the most integrated setting *appropriate to the needs of the individual*." (42 USC § 12182[b][1][B]; emphasis added.)

These are separate concepts: an individual qualified for (*i.e.*, eligible to profit from) an accommodation, and a setting

appropriate for (*i.e.*, capable of satisfying) the individual's needs. As applied to this appeal, one conclusion seems plain: some disabled individuals can benefit from community placement, and some may not. While all disabled are covered by the ADA, different remedies are recognized by the statute for different degrees of disability.

4. Government Interpretations

Regulatory history following the enaction of the ADA supports this basic analysis. The "integration regulation" blends the concepts of "qualified individual" and "appropriate setting". As applied here, the regulation required Georgia to provide caregiving services:

> "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." (28 CFR 35.130[d], reproduced at Pet. App. 45a.)

The analysis accompanying the integration regulation (Pet. App. at 47a-50a) acknowledges the need for "separate programs in limited circumstances" (*Ibid.* at 48a).

A separate but unrelated law was enacted four years after the ADA, entitled "The Developmental Disabilities Assistance and Bill of Rights Act", 42 USC § 6000 *et seq.* The House Report accompanying certain 1994 amendments to that statute offers an even clearer statement in support of institutional care for some people with disabilities:

> "The Committee recognizes that, with the appropriate resources and support, many individuals with developmental disabilities will live lives that are fully integrated into their respective communities. This potential, however, should not be seen as limiting the choice of individuals and their parents to seek living arrangements that are most suitable to their needs and wishes, *whether they be in the community or in institutions.*" (App. at 4a; emphasis added.)

With unmistakable directness, the House Report advises:

> "[T]he Committee would caution that the goals expressed in this Act to promote the greatest possible integration and independence for some individuals with developmental disabilities *not be read as a Federal policy supporting the closure of residential institutions.* It would be contrary to Federal intent to use the language or resources of this Act to support such actions. . .". (*Ibid.*; emphasis added.)

Statutes and regulations are implemented upon the real experience of actual citizens. So it has been here. Six months ago, a federal official charged with ADA enforcement duties, Sally K. Richardson, reviewed recent precedent, including the decision below, and pressed the community placement option. (Fla. App. at 1a-4a.) VOR promptly requested a clarification that "institutional care" was still an option.[6] (App. at 5a-6a.) The government's response was direct and correct:

> "I agree with you that the law is sufficiently clear that institutional services must be offered to individuals who wish to receive services in an institutional setting, [when] that setting is the 'most integrated setting appropriate to the needs of the individual'." (App. at 7a.)[7]

5. Summary

This Court may safely assume that all disabled welcome the maximum liberty which their condition permits. The differ-

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[6] In response to the Richardson letter, the National Association of State Medicaid Directors referred to "the current entitlement to institutional care". (Fla. App. at 15a-16a.) This reaction correctly reflected pre-ADA law. See *Pennhurst State School and Hospital* v. *Halderman*, 451 US 1, 24 (1981).

[7] Under the ADA, a disabled individual offered community placement is free to reject it in favor of institutional care. See 42 USC § 12201(d).

ence is medical: not all disabilities permit community placement. Only those "qualified individuals" may be so placed.

VOR submits that the ADA permits the conclusion that an institutional placement can be the "most integrated setting appropriate" for severely disabled individuals. This position appears to be consistent with the views of Georgia; of the states joining in the Florida *amicus curiae* brief, and of the Court of Appeals below. (Pet. Brief at 8; Fla. Brief at 11-12; Pet. App. at 21a and 30a, n. 10.)[8] It does not appear to be inconsistent with the position of respondents, who did not advocate institutional closure below.

C. The Alarming Dicta Below

The Court of Appeals was not presented with the availability of the institutional placement option under the ADA. Georgia conceded that respondents "could have been discharged to a highly structured community placement". (Petition at 3; Pet. App. at 22a, 35a.) Upon this concession, VOR supports affirmance.[9]

As the Court of Appeals analyzed the issue, the question considered was whether the ADA prohibited institutional placement when community placement was available, and more appropriate. (Pet. App. at 4a.) VOR presents the converse: does the ADA permit institutional placement if

[8] It is also consistent with two other Court of Appeals decisions considering the issue: *Helen L.* v. *Di Dario*, 46 F. 3d 325, at 336 and n. 22 (3 Cir. 1995); *cert. denied sub nom. Pennsylvania Secretary of Public Welfare* v. *Idell S.*, 516 US 813 (1995) and *Easley* v. *Snider*, *supra* n. 4, and one District Court decision, *Richard S.* v. *Department of Developmental Services of the State of California*, 973 F. Supp. 937, 941-2 (CD Cal. 1997). No authority to the contrary has been found. See nn. 11-12, *infra*.

[9] VOR believes that Georgia's funding defense is more appropriately addressed by the District Court, upon the remand already ordered by the Court of Appeals. Because this Court did not grant *certiorari* for Georgia's second question presented (Petition at *i*), VOR does not address the Fourteenth Amendment issue raised below.

available, and more appropriate than community placement? In each case, the answer should be "yes".[10]

VOR submits that the Court of Appeals correctly stated the applicable law when it concluded:

> "We emphasize that our holding does not mandate the deinstitutionalization of individuals with disabilities.
>
> * * *
>
> Where there is no . . . finding . . . [that a community-based placement is appropriate for that individual] . . . nothing in the ADA requires the deinstitutionalization of that patient." (Pet. App. at 21a; see, also, 30a, n. 10.)[11]

Unfortunately, this proper analysis came only at the end of the ADA portion of the opinion below. It was preceded by extensive *dicta* selectively reviewing legislative history and comparing institutional placement to racial segregation. The Court of Appeals virtually endorsed community placement over institutional placement with these words:

> "Placement in the community provides an integrated treatment setting, allowing disabled individuals to interact with non-disabled persons—an opportunity permitted only in limited circumstances within the walls of segregated state institutions. . .". (*Ibid*. at 8a.)

In its apparent enthusiasm for community placement, the Court of Appeals then misstated the thrust of the ADA:

[10] VOR's position is expressly supported by *Richard S.*, *supra* n. 8.

[11] This analysis matches that of the Santa Ana district court in *Richard S.*, *supra* n. 8. In pertinent part, that Court concluded:

> "This Court . . . holds Title II requires public entities to administer services in the 'the most integrated setting appropriate', regardless of whether that setting is an institution or a community home." (973 F. Supp. at 941.)

> "The Act's findings and legislative history make clear that Congress sought to eliminate the segregation of individuals with disabilities in passing the ADA. In enacting the ADA, Congress determined that discrimination against individuals with disabilities persists in a wide variety of areas of social life, including 'institutionalization'. . .". (*Ibid.*, at 10a-11a, citing 42 USC § 12101[a][3].)

From VOR's perspective, this language is inaccurate because it is unqualified. Community placement is a splendid idea—for those medically and emotionally able to enjoy it. But there are others whose disabilities are too severe to leave an institution safely. Those disabled are disserved by the apparent adoption of a placement goal unattainable for them.[12]

Balance and resolution do appear further on in the Court of Appeals opinion:

> "We do not suggest that, should a trial court find that a patient, for medical reasons, needs institutionalized care, it must nonetheless order placement in a community-based treatment program.
>
> * * *
>
> Nothing in the ADA . . . forbids a state from [placing] a patient [in] an institutionalized treatment setting, *as the patient's condition necessitates*." (Pet. App. at 24a; emphasis added.)

---

12 In reaching this result, the Court of Appeals unduly relied on *dicta* in the Third Circuit's opinion in *Helen L.*, *supra* n. 8. However, in *Helen L.*, as here: (a) the record indicated that community placement was appropriate on plaintiff's medical facts (46 F. 3d at 329 and n. 6), and (b) the Court indicated that the ADA permitted an institutional placement in an appropriate case (46 F. 3d at 336 and n. 22). Accordingly, on its facts, *Helen L.* does not support the deinstitutionalization pressure documented in the states' *amicus* brief. (Fla. Brief at pp. 2-9, including nn. 9-10, and p. 14; see ADAPT's polemics in Fla. App., at pp. 17a-21a.)

Precisely. Accepting this analysis, this Court should reject blanket language which prefers one placement alternative and excludes citizens whom the ADA intends to help. Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution.

Mr. Justice Blackmun perfectly captured that alternative in his concurrence in *Youngberg* v. *Romeo*, 457 US 307 (1982):

> "For many mentally retarded people, the difference between the capacity to do things for themselves within an institution, and total dependence on the institution for all of their needs, is as much liberty as they ever will know." (457 US at 327.)

While this Court should affirm the Court of Appeals upon Georgia's record concession, it should also confirm the availability of institutional placement upon an appropriate set of facts not presented here.

Conclusion

For the reasons advanced above, this Court should:

1. Affirm the Court of Appeals, on the undisputed factual ground that respondents L.C. and E.W. could be placed in the community;

2. Conclude that institutional placement and commuanity placement are each available alternatives under the ADA, with the choice dependent upon the unique medical, behavioral and care requirements of the disabled person involved;

3. Affirmatively disavow *dicta* in the Court of Appeals opinion promoting community placement as the only option under the ADA.

VOR welcomes this Court's consideration of an issue of deep concern to America's disabled.

Dated: New York, New York
February 3, 1999

Respectfully submitted,

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APPENDIX

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APPENDIX A

[LETTERHEAD OF DEPARTMENT OF LAW—
STATE OF GEORGIA]

January 21, 1999

VIA FACSIMILE & U.S. MAIL – 212-753-3950

William Burke, Esq.
Burke & Stone
400 Madison Avenue, Ste. 1101
New York, New York 10017

Re: *Olmstead v. L.C.*
No. 98-536

Dear Mr. Burke:

This is to consent to the request from Tamie Hopp, Executive Director of Voice of the Retarded, for leave to file an *Amicus Curiae* brief in the above-referenced case. John C. Jones was counsel of record for the Petition for Certiorari, but I an now counsel of record.

Very truly yours,

/s/ BEVERLY PATRICIA DOWNING
Beverly Patricia Downing
Senior Assistant Attorney General

BPD/

APPENDIX B

Permission for leave to file an *Amicus Curiae* brief

Return by January 22, 1999 to:

William Burke, Esq.
Counsel for Amicus Curiae

Burke & Stone
400 Madison Ave., Suite 1101
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212-752-5353
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On behalf of Petitioners-Appellant, I consent to Voice of the Retarded's participation in *Olmstead v. L.C.* by Zimring as *Amicus Curiae*.

/s/ SUSAN C. JAMIESON — DAVID WEBSTER
With Express Consent 1/21/99

Susan C. Jamieson
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Decatur, Georgia 30030

If you do *not* consent to VOR's participation as *Amicus Curiae*, please check here and return from: _____

APPENDIX C

DEVELOPMENTAL DISABILITIES ASSISTANCE AND BILL OF RIGHTS ACT AMENDMENTS OF 1993

November 18, 1993—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Dingell, from the Committee on Energy and Commerce, submitted the following

REPORT

[To accompany H.R. 3505]

7

SECTION-BY-SECTION ANALYSIS

Section 3 of the bill amends Section 101 of the Act to update the Findings and adds sections on Purposes and Policies of the Act. These changes reflect recent developments in the field and are consistent with other Federal disability policy. The language of Section 101 speaks of goals and priorities for individuals with developmental disabilities, but the entire section should be interpreted in the context of the policy articulated in 101(c)(2), which states that any assistance should be provided in an individualized manner, consistent with the unique strengths, resources, priorities, concerns, abilities, and capabilities of the individual.

For example, the findings state that while individuals with developmental disabilities may encounter discrimination, they have the same rights to enjoy full and productive lives as any other member of soci[illegible]y. Individuals with disabilities often require life long specialized services, but many individuals do not have adequate access to these services. The goals of the Act include providing individuals with developmental dis-

abilities the fullest range of possibilities to live productive and integrated lives, acknowledging that each individual will have different abilities, priorities, and concerns.

The Committee recognizes that, with the appropriate resources and support, many individuals with developmental disabilities will live lives that are fully integrated into their respective communities. This potential, however, should not be seen as limiting the choice of individuals and their parents to seek living arrangements that are most suitable to their needs and wishes, whether they be in the community or in institutions.

The Committee has heard from many parents of individuals with developmental disabilities who reside in large institutional facilities. Among the concerns expressed by these parents is that the goal of independent, community-based living for some individuals not be seen as a mandate for all individuals with disabilities. The Committee recognizes and supports the belief that each individual and each respective family have different goals and needs. The Findings, Purposes, and Policies of this Act should in no way be read to support one kind of residential placement over another.

Furthermore, the Committee would caution that goals expressed in this Act to promote the greatest possible integration and independence for some individuals with developmental disabilities not be read as a Federal policy supporting the closure of residential institutions. It would be contrary to Federal intent to use the language or resources of this Act to support such actions, whether in the judicial or legislative system.

The section also amends the definition of States for purposes of the Act by clarifying that Guam is eligible to apply as a State for the University Affiliated Programs grants.

APPENDIX D

[LETTERHEAD OF VOICE OF THE RETARDED]

COPY

September 14, 1998

Sally Richardson, Director
Center for Medicaid and State Operations
U.S. Department of Health and Human Services
Health Care Financing Administration
S-2 2612
7500 Security Blvd.
Baltimore, MD 21244-1850

Dear Ms. Richardson:

On July 29, 1998, you sent to all state Medicaid directors a letter summarizing three Medicaid cases related to the Americans with Disabilities Act (ADA): *L.C. & F.W. v. Olmstead, Helen L. v. DiDario,* and *Easley v. Snider.*

Your letter quite clearly states that the ADA, and the court rulings featured, do not "require a State to serve everyone in the community but that decisions regarding services, and where they are to be provided must be made based on whether community-based placement is appropriate for a particular individual . . ." (July 29, 1998 letter, referencing Olmstead). This is the essence of person-centered planning. Serving individuals according to their need and choice is the cornerstone of the Medicaid program, indeed. Freedom of choice is required by Medicaid law.

Despite the clarity of your words, your letter is being used by advocates to claim the ADA requires community placement for all individuals with developmental disabilities. These advocates claim that institutional care, even for those individuals who require that level of care, violates the ADA.

Your letter, and President Clinton's speech in conjunction with its release, are being used inappropriately and out of context.

Please issue a letter that clarifies HCFA's support for institutional care (i.e., the ICF/MR program) when that level of care is the "most integrated setting appropriate to the needs of qualified individuals with disabilities," as required by the ADA.

Ms. Richardson, thank you for attention to this request. I look forward to your response.

Sincerely,

/s/ POLLY SPARE
Polly Spare
President
Voice of the Retarded

APPENDIX E

[LETTERHEAD OF DEPARTMENT OF HEALTH CARE FINANCING ADMINISTRATION]

Ms. Polly Spare
President
Voice of the Retarded
5005 Newport Drive, Suite 108
Rolling Meadows, Illinois 60008

Dear Ms. Spare:

I am responding to your September 14, 1998, letter to Sally Richardson in which you express concern about public interpretation of our July 29, 1998, letter to all State Medicaid Directors. As you note, our July 29 letter was intended to provide information on recent court cases related to the Americans with Disabilities Act (ADA). We did not intend to make a policy statement concerning the Health Care Financing Administration's interpretation of the ADA.

I agree with you that the law is sufficiently clear that institutional services must be offered to individuals who wish to receive services in an institutional setting, and that setting is the "most integrated setting appropriate to the needs of the individual."

I also recognize the many concerns being raised with the recent trends involving Medicaid and the ADA. We will be working with States to ensure that State Medicaid programs provide services in the most integrated setting appropriate to the needs of individual Medicaid clients.

Thank you for your continued interest in the welfare of Medicaid consumers.

Sincerely,

/s/ MARY JEAN DUCKETT
for Richard P. Brummel
Acting Director
Disabled and Elderly Health
Programs Group